

State Records Committee Meeting

Division of Archives,
Courtyard Meeting Room
September 12, 2013
Salt Lake City, Utah

SRC APPROVED
Date October 10, 2013
3411

Members Present: Lex Hemphill, Media Representative
David Fleming, Private Sector Records Manager
Patricia Smith-Mansfield, Governor's Designee
Ernest Rowley, Elected Official Representative
Holly Richardson, Citizen Representative
Doug Misner, History Designee

Legal Counsel: Paul Tonks, Attorney General's Office
Chiarina Glead, Attorney General's Office

Executive Secretary: Susan Mumford, Utah State Archives

Others Attending: Matt Anderson, Utah Department of Corrections, respondent
Nate Carlisle, *Salt Lake Tribune*
Rosemary Cundiff, Archives staff
Susan Eisenman, Attorney General's Office
Bruce Garner, Administrative Services, respondent
Robert Gehrke, *Salt Lake Tribune*, petitioner
Tani Downing, Risk Management, respondent
Lynn P. Heward, Petitioner's representative
Debbie Kurzban, Attorney General's Office
Michelle Larsen, Citizen
Donald Meyers, *Salt Lake Tribune*
Lorianne Ouderkirk, Utah State Archives
Eric Peterson, *Salt Lake City Weekly*, petitioner
Lana Taylor, Attorney General's Office, respondent
Robert Sandoval, Robert, Risk Management
Rebekkah Shaw, Utah State Archives

Mr. Lex Hemphill opened the meeting at 9:35 a.m. The party originally scheduled as third on the agenda asked to be first because of scheduling conflicts in the afternoon. Mr. Hemphill agreed to let them present first. Ms. Smith-Mansfield said that she worked under the Department of Administrative Services. Archives was a sister agency to Risk Management, one of the respondents. She offered to recuse herself if either party had an issue with that relationship. Neither party expressed a concern. Mr. Hemphill explained the procedures of the hearing.

Hearing: Clara Fernanda Ruiz vs. Department of Administrative Services

Opening—petitioner

Mr. Lynn Heward introduced himself as an attorney for the Robert J. DeBry and Associates law firm. He represented Clara Ruiz and her parents. An investigator was hired by the law firm. He had learned there were statements from two witnesses, a report and photos. A GRAMA request was made for these records to the Division of Risk Management and was denied. The records were denied as protected. Mr. Heward said, pursuant to Utah Code 63G-2-403(11)(b), the committee had the discretion to weigh the interests of the parties relevant to the classification and decide if the records should be disclosed. The records were denied by Mr. Steven Wallkenhorst and then by Kenneth Hansen. Mr. Heward said Mr. Hansen recommended that the petitioner had access to the records through a legal process. The parties were not involved in a legal process and had not gone to court. In the request it was stated that the injured party, Clara Ruiz, who was injured at the hands of the public entity, could not speak and could not identify witnesses or describe the incident. Mr. Heward said he was asking for just the facts of the case. A few records had been received from the school but some were withheld. He asked the committee to review the records considering that Clara herself was unable to communicate anything about the accident she was involved in.

Opening -- respondent

Bruce Garner, attorney for the respondent, introduced himself. Tani Downing, the Director of Risk Management, introduced herself. Mr. Garner said the reason for protecting the documents was clear. Risk Management should be able to gather facts of a particular case without being the investigator for the plaintiff or the person who has been injured. He explained the process followed by the division. An insurer notifies Risk Management of an injury. An adjuster is then assigned. The adjuster, Bob Sandoval, started collecting information with the knowledge that the file will be protected. It serves the public interest to protect the information. It serves as both an investigation and an analysis. That way it can be a candid assessment of the claim. It is a protection to Risk Management to conduct an investigation. It is not intended for the plaintiff. Once a lawsuit is filed, a plaintiff can ask for discovery under the stewardship of a judge. The plaintiff has an opportunity in court once a lawsuit is filed. The petitioner in this hearing can have access to all the reports generated by the Ogden School District where the accident happened. The request is an attempt to get documents outside of the litigation process. While the plaintiff can't get the contents of an insurer's file, the facts come out in court. Mr. Garner cited the Utah Supreme Court case of Askew v. Hardman from 1996 and said the content of the insurer's file was not released. The facts can be discovered through the court process or by a GRAMA request to the school district.

Testimony-- petitioner

A photo of Clara and her parents was passed to the committee. Mr. Heward said that Clara could not speak and could not relate what happened in the accident. Witness statements, reports, and photos were requested because the person involved could not relate anything about the accident. The petitioner had to rely entirely on what Ogden School District was willing to give them. He said the school district had released four pages of information: a general liability report, a timeline by Stacy Driggs, and a narrative by the person who lost control of the wheelchair and slipped on the icy hill. It was not apparent from the records where the accident happened. If there are other records, the petitioner would like to have them. They had been told there was a law

enforcement officer who investigated. A report by Detective Hunt was mentioned. The report was not provided but that is a report the petitioner would like to have. The petitioner was trying to solve the issue without going to litigation. The petitioner has a right to know the facts of the case in order to negotiate a settlement.

Testimony – respondent

Bruce Garner said the names of witnesses can be given verbally without giving access to the investigative file. The petitioner's representative can go to Ogden School District to request the records. Ms. Downing said there are twenty-seven employees in the Division of Risk Management. Nine of the employees are claims adjusters who investigate 2000 cases a year. It is important that the adjusters are able to operate in privacy. Claims adjusters needed the privacy so that the insured parties would not fear the disclosure of information to plaintiffs. A candid conversation with the insured parties was necessary to protect the interests of the state. A significant number of cases can be settled before going to litigation. This case has not been settled. The petitioner has options to settle or to pursue litigation. The parties are not yet at the point of deciding whether to settle or litigate. The only public record is the settlement document which is produced by the insurer. The investigative report, pursuant to Utah Code 63G-2-305(18), is the information that is collected and prepared in anticipation of litigation. The investigative file is protected even after a settlement.

Closing –petitioner

Mr. Heward said the petitioner was trying to resolve the situation fairly based on the facts. When the victim of the accident had no ability to talk about the accident, it was difficult to get information. The witness statements would be helpful. Also requested were the incident report and the photos. The respondent offered to provide the names of witnesses and that was appreciated. If the interest of the victim is taken into account, the information should be released so that a fair settlement is possible. Mr. Heward said if it were a criminal case, the person charged would have access to all the information in order to prepare a defense. If the information can be found from another source then the petitioner will get the information from that source.

Closing – respondent

Mr. Garner said there was no charge or litigation against Mr. Heward's client and a criminal analogy was inappropriate. There is a specific protection for Risk Management investigations. The school district does not have the same protection. An insurance investigation is protected. The petitioner's representative has not taken reasonable steps to investigate the facts of the accident. The petitioner should pursue an investigation and not ask for the investigation conducted by Risk Management.

Deliberation

Ms. Smith-Mansfield made a motion that the records were properly classified under Utah Code 63G-2-305(18) and (24). Mr. Fleming seconded the motion. A vote was taken. The vote was unanimous in favor of the motion. Since the petitioner asked that the committee use the weighing provision pursuant to Utah Code 63G-2-403(11)(b), in order to consider releasing the records. Ms. Smith-Mansfield said it was an individual interest rather than a public interest claim. Mr. Fleming said it may be in the public interest to avoid litigation. Providing the witness names was appropriate. Mr. Rowley said the petitioner could depose the witnesses and track down Detective

Hunt in order to find the information requested. Mr. Hemphill said the weighing provision was not being considered. An order with the committee's decision would be sent to the parties within seven business days.

10:48 Hearing Continued Eric Peterson vs. Utah Attorney General's Office (AG)

Mr. Hemphill explained the two separate issues in the hearing. The members of the committee reviewed the email records separately at the Archives Building. The second part of the request involved the investigative files in the Whitewater case. The issues would be dealt with separately. Review of the email records was the subject of the current hearing.

Opening -- petitioner

Mr. Peterson asked what the current hearing was intended to accomplish. He said he thought the committee had decided that both the emails and the investigative files were protected. The committee had reviewed them to use the weighing provision to consider releasing some of the information in the public interest.

Opening -- respondent

Ms. Taylor said that Federal Rule 6 provided that investigation into a grand jury matter is not open to the public. An assistant U.S. attorney can subpoena someone, including a state entity, and the individual cannot disclose the matter except through an order of the federal district court. Ms. Smith-Mansfield said the argument had not been made in the earlier hearing with Mr. Peterson. She asked Ms. Taylor if she was making the argument that the protection of the emails was under Rule 6. Ms. Taylor did not reply to the question directly. She said the Jeff Jones emails did not seem to relate or be responsive to the request. She said she had no personal knowledge of the news that John Swallow and Mark Shurtleff had been cleared of federal charges. The Whitewater case had been referred to federal authorities. Mr. Rowley said he had seen nothing in the records that warranted release in the public interest. Mr. Hemphill made a motion that the six emails marked by the Attorney General's Office as non-responsive were responsive and should be released to Mr. Peterson. The other 33 were the subject of an ongoing investigation and should remain protected under Utah Code 63G-2-305(10)(a). With no second to Mr. Hemphill's motion, it was withdrawn. Mr. Rowley made a motion that the second group of emails identified as part of an investigative file was protected pursuant to Utah Code 63G-2-305(10)(a) and should not be released. Mr. Fleming seconded the motion. A vote was taken. Ms. Richardson and Ms. Smith-Mansfield voted against the motion. Mr. Hemphill, Mr. Rowley, and Mr. Fleming, voted in favor of the motion. The motion passed three to two. Mr. Hemphill made a motion that the six emails marked as non-responsive should be released with personal information redacted. Ms. Smith-Mansfield seconded the motion. A vote was taken. The motion passed unanimously. Mr. Hemphill said the investigative files were found by the committee to be properly classified under Utah Code 63G-2-305(10)(a). Since the last hearing, the investigative files had been sent to the federal government and were not be in the custody of the Utah Attorney General's Office. Ms. Taylor said the authority for disclosure of the records was transferred to the federal government. Under Rule 6, the records are exempt from GRAMA under Utah Code 63G-2-201-(6)(a), and the committee has no jurisdiction. Ms. Smith-Mansfield made a motion for a continuance of the current hearing until after the next hearing. Mr. Fleming seconded the motion. The vote was unanimous in favor of the continuation.

12:12 p.m.

Robert Gehrke vs. Utah Attorney General's Office

Opening -- Petitioner

Mr. Gehrke said that in July he requested subpoenas served on the AG's Office and any documents and communications produced as a response to the subpoenas. The records were denied as protected under Federal Rule 6C. He questioned whether the AG's office was a cooperating agency or a witness. The Attorney General's Office was not acting as a participating party in the investigation. It was rather acting as a witness and witnesses cannot be prohibited from disclosing information related to the grand jury investigation.

Opening -- respondent

Ms. Lana Taylor said that releasing a copy of the correspondence and subpoenas would be disclosing a matter before the grand jury. Rule 6, a federal rule of criminal procedures, prohibits the disclosure of information by a person or personnel of a governmental entity assisting in performing duties in enforcing criminal law. The rule prohibits such a person from disclosing matters before the grand jury if the grand jury matter has not been closed. Federal Rule 6 provides that while an investigation of a grand jury matter is open, an assistant US attorney can subpoena someone, including a state entity. The individual cannot disclose the matter except through an order of the district court.

Testimony -- petitioner

Robert Gehrke said the classification of the records depended on whether the Attorney General's Office participated in the capacity of a witness or as part of a federal investigation enforcing criminal law. It was not performing the services necessary to qualify as assisting in the enforcement of criminal law. To be government personnel meant members of the prosecution and staff, not witnesses providing testimony. The office was not deputized to investigate itself. The attorneys in the AG's office were not assisting with a federal prosecution. An attorney for the government should provide notice to the district court that she was acting as such. Information is shared among and with prosecutors. A subpoena is not used to solicit assistance. The AG's office is not acting as an attorney for the government. There was a precedent for requesting and receiving subpoenas from the AG's Office. In April 2012, during an investigation of Worldwide Environmental, the *Salt Lake Tribune* had requested and received subpoenas that were part of the investigation. Mr. Gehrke encouraged committee to expedite the release of the documents the AG's office was withholding.

Testimony -- respondent

Ms. Taylor said the purpose behind the protection of the subpoenas and other related records is for the investigating agency to be able to investigate and maintain records for criminal or administrative purposes. If a matter is before a grand jury, the documents should not be disclosed. To disclose a subpoena would disclose the matters before the grand jury. Subpoenas can disclose a great deal about the matter before the grand jury. The fact that the records were obtained under a subpoena suggests they are under Rule 6. A court order from a federal judge can be requested to get information from a grand jury. A GRAMA request applies to records requested from a governmental entity. The subpoenas and the correspondence related to the

subpoenas are records maintained as part of the federal investigation and could be obtained with a court order.

Closing – petitioner

Mr. Gehrke said the AG's office was either assisting in the federal prosecution or a subject of the investigation. There is no obligation of secrecy if they do not qualify as assisting in the federal prosecution. The subpoenas were served on the office as a witness and there is no restriction of secrecy or obligation to keep the records secret. Most courts do not consider individual documents to be matters before the grand jury. If the records are being protected under Rule 6, the U.S. Attorney General's office would raise an objection. They are not assisting in the prosecution so there is no exemption from disclosure. Mr. Gehrke said he was trying to gather evidence that is a public record. The Utah Attorney General's Office does not fit the requirement for attorneys for the federal government when they are subpoenaed as a witness.

Closing – respondent

Ms. Taylor said all the requested documents are protected under Rule 6. The petitioner has asked for any subpoenas since April 2013. The request deals with documents protected because the federal government is sharing information with the Utah AG's office. Because the Utah AG's office received a subpoena, it is prohibited from sharing that information and a threat of contempt is implied. The records are protected and disclosure is prohibited. The subpoenas and the correspondence would reveal and disclose information about matters before the grand jury.

Deliberation

Ms. Smith-Mansfield said the governmental entity has represented to the committee that the records requested are not subject to GRAMA, but are governed by Federal Rule 6. Pursuant to Utah Code 63G-2-201(3)(d), Ms. Smith-Mansfield was not persuaded that the records fell under Rule 6 or were provided to assist the federal government. Most courts do not consider documents as matters before the grand jury. She made a motion that subpoenas, correspondence about subpoenas, and documents provided by the Utah Attorney General in response to the subpoenas were public and should be released. Ms. Richardson seconded the motion. A vote was taken. Mr. Rowley voted against the motion. Mr. Hemphill, Mr. Fleming, Ms. Richardson, Mr. Misner, and Ms. Smith-Mansfield voted in favor of the motion. The motion passed five to one. Mr. Hemphill said an order would be sent to the parties within seven days.

Peterson hearing continued

Mr. Peterson said he is fine with a continuance. Ms. Taylor will submit new arguments to support the governmental entity's position. Ms. Smith-Mansfield made a motion to continue the Eric Peterson vs. Utah Attorney General's Office hearing until October. Mr. Fleming seconded the motion. A vote was unanimous in favor of the motion.

Other Business

Approval of the August 8, 2013 minutes

Ms. Smith-Mansfield made a motion to approve the minutes. Ms. Richardson seconded the motion. A vote was taken. Mr. Hemphill, Mr. Fleming, Mr. Rowley, Ms. Richardson, and Ms.

Smith-Mansfield voted in favor of the motion. Mr. Misner abstained as he had not attended the meeting. The minutes of August 8, 2013 were approved.

Retention schedule submission

Rebekkah Shaw presented the state general retention schedule: Publications, 97208 , to the Committee. There was a reference in the retention schedule to copies of publications being provided to the State Library. Clarification of this issue needed to be resolved before approval. Rebekkah was asked to submit the schedule when that issue was resolved.

Appeals to the SRC

See the attached list of appeals received during the month.

Cases in District Court

Paul Tonks, attorney for the committee, reported on current cases in district court. See the attached document.

New member of the committee

Marie Cornwall was appointed by Governor Gary Herbert as a citizen representative on the State Records Committee. Confirmation is expected on September 18, 2013, by the Utah State Senate.

The meeting was adjourned by acclamation at 2:35 p.m. The next meeting is scheduled for October 10, 2013.

STATE RECORDS COMMITTEE
September 12, 2013

State Archives Building, Courtyard Meeting Room
346 S. Rio Grande (450 West)
Salt Lake City

AGENDA
Call to Order 9:30 a.m.

Hearings (not in order of scheduling)

Continuance: Eric Peterson, *Salt Lake City Weekly* vs. Utah Attorney General's Office. Mr. Peterson is appealing the denial of records of an investigation into the Whitewater VII Development and records of communications.

Robert Gehrke vs. Utah Attorney General's Office. Mr. Gehrke is appealing the denial of correspondence and copies of subpoenas.

Clara Fernanda Ruiz vs. Department of Administrative Services, Division of Risk Management. The family of Ms. Ruiz, represented by Robert J. Debry & Associates, is appealing the denial of an accident report.

BUSINESS

Approval of August 8, 2013, SRC Minutes, action item

Approval of retention schedules, action item

SRC appeals received

Cases in District Court

Other Business

ADJOURNMENT

Next SRC meeting scheduled for October 10, 2013

**SRC Appeals Received
September 2013**

1. **13-26 Eric Peterson, Salt Lake City Weekly vs. Utah Attorney General's Office.** Mr. Peterson is appealing the denial of records of an investigation into the Whitewater Development and records of communication. Continuance of hearing scheduled for September.
2. **13-25 Colleen Schulte vs. Summit County.** Ms. Schulte is appealing a partial denial of records from the Summit County Attorney's Office involving the County Attorney's office and a specific person. Hearing postponed. Scheduled for October.
3. **13-28 Clara Fernanda Ruiz represented by Steven Sullivan of Robert J. DeBry & Associates vs. Division of Risk Management.** Ms. Ruiz's representative is appealing the denial of an incident report and witness statements of an accident. Hearing scheduled for September.
4. **13-29 LuAnn Justesen vs. Iron County Sheriff's Office.** Ms. Justesen is appealing the denial of a copy of a recording of a call she made to the Sheriff's dispatch number and any notes made by the dispatcher. Hearing cancelled
5. **Harshad Desai vs. Utah State Office of Education.** Mr. Desai is appealing the lack of response to a request for the composition of employees of Garfield school District employees. Hearing cancelled.
6. **Robert Gehrke, Salt Lake Tribune vs. Utah Attorney General's Office.** Mr. Gehrke is appealing the denial of any subpoenas or documents received by the AG's Office from federal investigative agencies. Hearing scheduled for September.
7. **Corey Vonberg vs. Iron County Sheriff.** Mr. Vonberg is appealing the partial denial of procedures for investigating an alleged child sex offense and a disposition of evidence form. Hearing scheduled for October.
8. **Salt Lake School District vs. Utah State Auditor's Office.** The District is appealing the denial of copies of complaints against the District received by the Auditor's Office. Hearing scheduled for October.

September 2013 Records Committee Case Updates

District Court Cases

Williams v. Mumford, 3rd Judicial District, Salt Lake County, Case No. 130901187, Judge Faust, filed February 14, 2013.

Current Disposition: On July 26, 2013, AG office filed a Motion to Dismiss case based upon: (1) Failure to name proper parties (State Records & Department of Corrections); (2) Failure to file an appeal in the proper amount of time; (3) Failure to file a proper complaint; (4) Failure of Service. Williams filed a Motion to Strike our Motion to Dismiss on August 20, 2013. We filed a Memorandum Contra to the Motion to Strike and a Notice to Submit our Motion to Dismiss on August 30, 2013.

Utah Transit Authority v. Janelle Stecklein, 3rd District, Salt Lake County, Judge Parker, Case No. 120908696, filed December 21, 2012.

Current Disposition: Case in discovery stage with exchange of interrogatories and requests for admissions.

Lawrence v. Dept. of Public Safety, 3rd District, Salt Lake County, Case No. 120907748, Judge Dever, filed November 19, 2012.

Current Disposition: Lawrence has filed a request for payment of attorney fees against Public Safety.

Utah Dept. of Human Services v. Wilson, 3rd District, Salt Lake County, Case No. 120903186, Judge Kelly, filed May 10, 2012.

Current Disposition: Mr. Wilson has filed a Civ.R. 59 Motion for Relief from Judgment. The briefing has been completed and submitted to the court.

Salt Lake City v. Jordan River Restoration Network, 3rd Judicial District, Salt Lake County, Case No. 100910873, Judge Stone, filed June 18, 2010.

Current Disposition: Jordan River has filed a motion for leave to file a second amended counterclaim, raising issues of denial of due process. Salt Lake City opposes and has briefed the issue.

Appellate Court Cases

Attorney General Office. v. Schroeder, Court of Appeals Case No. 20121057.

Current Disposition: Trial held on October 19, 2012. Appeal filed by Schroeder requesting matter to be heard by the Utah Supreme Court. AG counsel has been assigned to represent the AG's office, Paul Tonks assigned to represent the Committee.

Salt Lake City Corp. v. Mark Haik, Court of Appeals Case No. 20130383.

Current Disposition: Summary Judgment granted in favor of Salt Lake City Corp. Court found that it had jurisdiction to hear appeal filed by Salt Lake City Corp. from a decision by its appeals board, holding that a governmental entity with appeal procedures set up pursuant to Utah Code § 63G-2-701 still get a right to an appeal to district court similar to an appeal from the State Records Committee. Court granted Motion to Dismiss the Committee since it was not a party to the proceedings below. An appeal has been filed with the Utah Court of Appeals by Mr. Haik.